Supreme Court, U.S.
FILED
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No. ‘

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

NATIONAL REFRACTORIES & MINERALS CORPORATION,
Petitioner,
vs.
GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a presumption of arbitrability applies to the right to engage in a partial closure of business in light of this Court's ruling in *First National Maintenance Corp.* that closure is an inherent management freedom, not a mandatory subject of bargaining, and there is no clear and unmistakable waiver of the right to close in the underlying arbitration agreement?

2. Whether courts in determination of arbitrability issues under the Labor Management Relations Act are restricted to an examination of the express language in a collective bargaining agreement's arbitration clause or may examine the intent of the parties in (a) other portions of the contract, such as the management rights, work covered, and zipper clauses, (b) negotiation history, and (c) other relevant bodies of evidence?

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GENERAL TEAMSTERS, WAREHOUSEMEN AND
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner National Refractories and Minerals Corporation (hereinafter "Petitioner" or "the Company")[1] respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *General Teamsters, Warehousemen and Helpers Union, Local 890 v. National Refractories & Minerals.*

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[1] Petitioner National Refractories and Minerals Corporation, a California corporation, is a wholly-owned subsidiary of the parent company, National Refractories Holding Company, a Delaware Corporation ("NRHC"). Two of Petitioner's subsidiaries are wholly owned. A third subsidiary of Petitioner, National Refractories de Mexico, S.A. de C.V., is owned in part by Petitioner and in part by NRHC. Sup.Ct.R.29.1.

OPINIONS BELOW

The opinion of the district court is printed at 1993 U.S. Dist. LEXIS 10463 and is reprinted in Appendix A.[2] The opinion of the Ninth Circuit in *General Teamsters, Warehousemen and Helpers Union, Local 890 v. National Refractories & Minerals* is printed at 1995 U.S. App. LEXIS 3657 and is reprinted in Appendix B.[3]

JURISDICTION

The Order of the Ninth Circuit Court of Appeals was entered on February 23, 1995. On April 19, 1995, the Ninth Circuit Court of Appeals denied a timely petition for rehearing (by 2-1 vote), and also denied a suggestion for rehearing *en banc*. (*See* Appendix C.) This Court has jurisdiction to review the decision of the Court of Appeals by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

The Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141 *et seq.* (1988) and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* (1988) govern the rights of employers and unions with respect to collective bargaining, terms and conditions of employment, and arbitration. NLRA, 29 U.S.C. § 158(d) (1988); LMRA, 29 U.S.C. § 185 (1988).

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[2]The district court was vested with jurisdiction by 29 U.S.C. § 185 (1988). Sup.Ct.R.14.1(i).

[3]For purposes of deciding whether to grant this petition, the unpublished status of the Court of Appeals decision is immaterial. This Court grants *certiorari* in cases where the prior opinion is unpublished. *See, e.g., Harris v. Forklift Systems, Inc.*, ____ U.S. ____, 114 S.Ct. 367 (1993).

STATEMENTS

A. STATEMENT OF FACTS.

1. The Nature Of Petitioner's Business And Economic Realities Forced Closure of Petitioner's Synthetic Product Manufacturing Operation.

Petitioner is an employer in the refractory industry. Refractory products are used in the production of steel as heat resistant lining for kilns and other equipment. Prior to the emergence of The People's Republic of China as a competitor in this marketplace, Petitioner produced synthetic magnesias by interacting raw mined dolomite with sea water and superheating the product in kilns. The product, KF-95, was then made into bricks.

Since the mid-1980's, production costs for synthetic magnesia have risen steadily. At the same time, China began exporting raw mined magnesite, a cheaper product. Faced with the economic realities of the marketplace, as well as customer demand for the natural, less expensive product, the Petitioner in 1992 decided to terminate the production of synthetic product and import natural Chinese magnesite. The decision to discontinue manufacturing synthetic product resulted in several layoffs of union workers. (Appendix A, pp. A-1, A-2; Appendix B, p. B-2.)

2. The Parties' Collective Bargaining Agreement Grants Management The Exclusive Right To Make Decisions Regarding Plant Closings And Material Purchases.

For over fifty years Petitioner has been signatory to successive collective bargaining agreements ("CBA" or "Agreement") with the California Master Building Trades Council and Teamsters Local 890 ("Union" or "Respondent"). The Agreement contains mandatory grievance and arbitration procedures set forth in Article XXI, Section A.

(Appendix D, p. D-8.) It states in general terms that "[a]ny disagreement or dispute between the parties hereto shall be handled as set forth below." The remainder of that Article, as well as other sections of the Agreement, provide evidence of the parties' intent on the scope of "dispute" in this clause.

For example, key language in the arbitration clause dictates that arbitration is only appropriate for disagreements concerning violations of the Agreement. Specifically, Article XXI(A), Section 2(C), limits the power of the Joint Committee on Contract Administration to devise remedies to correct "any violations of this agreement." (Appendix D, p. D-10.)

Second, Article XXVI, Section B, the "zipper clause" of the Agreement, provides that "no agent or representative of either party has authority to make . . . any statement, representation, promise, inducement, or agreement not set forth herein . . ." (Appendix D, p. D-15.) Read in conjunction with Section 2(C), Article XXVI, Section B provides that the parties may not agree to arbitrate subjects unless the agreement to do so is specifically set forth in the language of the Agreement.

As to the purchase of raw magnesite rather than production of a synthetic product, the management responsibilities clause, Article IV, addresses what issues the unions may dispute under the contract. Section B addresses Petitioner's unfettered right to staff jobsites as needed. (Appendix D, pp. D-6, D-7.) Subsection B(2) expressly provides Petitioner with the unilateral right to use any type or quantity of materials in production — including discontinuing the manufacture of synthetic material and purchasing natural product. It states: "The Employer shall not be hindered or prevented from using any type or quantity of machinery, material, or appliances; nor shall the union attempt to

regulate production at any of the plants or quarry." (Appendix D, pp. D-6, D-7.)

These contract clauses express the intent of the parties to: (1) arbitrate only disputes covered by the contract; and (2) remove Petitioner's material purchase and partial closure decisions — the subject of the underlying litigation — from contract coverage and, therefore, from arbitration.

3. The Parties' Bargaining History Is Forceful Evidence Of The Intent To Exclude Disputes Of This Nature From Arbitration.

Bargaining history establishes that Articles IV and XXI of the CBA have been consistently interpreted by the parties to exclude arbitrability of grievances like the one at issue in this case. (Appendix E, p. E-3.) Limits on the subcontracting of bargaining unit work have been discussed by the parties since the 1950's. Relevant CBA language only limits contracting of *onsite* work. (Appendix E, p. E-4.) There has never been any discussion between the parties regarding abrogation of management's unfettered right to close a production operation.

Consistent with this bargaining history, not a single grievance has been filed concerning the closure of a product line for the past 22 years. Instead, layoffs borne of product changes have been governed solely by management discretion. (Appendix E, p. E-4.) This litigation provides the single exception to this decades-old practice and understanding.

B. DECISION BELOW

On June 18, 1992, the Union grieved Petitioner's partial plant closure and layoff. Petitioner denied the grievance, contending that its decision to close and to import raw magnesite was not subject to the grievance and arbitration procedure. (Appendix A, pp. A-2, A-3.)

Thereafter, on December 18, 1992, the Union filed the Complaint in this action in the United States District Court for the Northern District of California. The action named Petitioner and alleged that the Company breached the parties' collective bargaining agreement by refusing to arbitrate a contractual grievance. The Union sought an order compelling arbitration. Petitioner answered the Complaint on January 11, 1993.

The parties filed cross-motions for summary judgment. The district court entered an order on June 25, 1993, granting the Union's motion for summary judgment and denying Petitioner's motion.[4]

Petitioner appealed the district court order to the United States Court of Appeals for the Ninth Circuit on July 26, 1993. Following briefing and oral argument, on February 23, 1995, the Court of Appeals affirmed the district court by a 2-1 vote over a strong dissent by Circuit Judge Kleinfeld. (Appendix B.) On April 19, 1995, the Court of Appeals denied the Company's Petition For Rehearing And Suggestion For Rehearing *En Banc.* (Appendix C.)

In its decision below, the Court of Appeals conceded that the Petitioner's decision to import raw material from China "arguably resulted in the partial closure of the Company's manufacturing site and the layoff of some union workers." (Appendix B, p. B-2.) The Court of Appeals relied heavily on two 1991 decisions, *Westinghouse Hartford Co. v. Hanford Atomic Metal Trades Council*, 940 F.2d 513 (9th Cir. 1991) and *Christensen v. General Building Contractor, Inc.*,

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[4]In its order (Appendix A, p. A-2), the district court found that (1) the Union was attacking the Company's partial closure decision, (2) labor costs were not a factor in the decision, and (3) arbitration is required only for disputes which arise under the Agreement. (*Id.* at p. A-6.) Nonetheless, the district court ordered arbitration of the closure issue. *(Id.)*

952 F.2d 1073 (9th Cir. 1991) for its ruling that the partial closure in the instant case is arbitrable. In particular, the pivotal precedent for the Court of Appeals was found in two principles: first, that an express exclusion from arbitration is necessary where there is a broad arbitration clause (Appendix B, pp. B-3, B-4); second, that the Court of Appeals would "look only to the contract's arbitration clause, rather than to the substantive provisions of the agreement" to determine arbitrability. (Appendix B, p. B-4.)[5] In view of this precedent, a two judge majority on the three judge panel at the Court of Appeals held that there was no express exclusion in the parties' arbitration clause for partial closures. *Id.*

As to this Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Court of Appeals determined that the statutory rights set forth in *First National Maintenance Corp.* were not "relevant," because the decision does not constitute an express exclusion in the parties' arbitration clause — the sort of evidence required by the Court of Appeals' own precedent. (Appendix B, p. B-5.) In fact, the district court articulated this point more clearly, stating that nothing in the *First National Maintenance Corp.* decision is "forceful" evidence required to overcome the presumption of arbitrability. (Appendix A, p. A-6.)

Circuit Judge Kleinfeld dissented. He noted that the Ninth Circuit precedent limiting review to a search for an express exclusion in the arbitration clause, coupled with

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[5]The district court also followed precedent of the Ninth Circuit requiring a limited review of the parties' contract. (Appendix A, pp. A-5, A-6.) In distinguishing decisions from other circuits, the trial court noted, "In the Ninth Circuit, unlike other circuits, it is the intent to *exclude* matters from coverage of a broad bargaining agreement that must be shown by compelling evidence of expressed intent. All matters not expressly excluded are presumed subject to the agreement." (Emphasis added.) (Appendix A, p. A-7.)

another precedent — that frivolousness is no barrier to arbitrability (citing, *Building Materials and Constr. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1194 (9th Cir.), *cert. denied,* 488 U.S. 986 (1988) — leads to absurd results: "Without even frivolousness as a limitation, and with a contract providing for arbitration of 'any disagreement or dispute,' there would be no barrier to arbitration of anything." (Appendix B, p. B-6.) By the precedent established and followed in the Ninth Circuit, writes Judge Kleinfeld, a court must order arbitration over everything from the vice-president's compensation package and issuance of preferred stock to purchase or sale of a quarry. (*Id.*, at pp. B-6, B-7.)

The dissenting opinion carefully reasoned that broad arbitration clauses must be read in the context of the bargaining relationship, and that "the language implies disputes over issues which are intended by the parties to be the subject of collective bargaining." (*Id.*, at p. B-7.) According to the dissent, the facts of the instant case in conjunction with *First National Maintenance Corp.* resolve the issue: partial closures are not mandatory subjects of bargaining under *First National Maintenance Corp.*, and the parties' contract in this case contains no waiver of the right to engage in partial closure; to the contrary, the contract has strong management rights language which reserves such decisions to management. (*Id.*, at pp. B-7, B-8, B-9.) The dissent maintains that to hold otherwise in this case relegates the decision on arbitrability itself to the arbitrator in defiance of this Court's decision in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (hereinafter *"AT&T"*). (Appendix B, p. B-6.)

REASONS FOR GRANTING THE WRIT

A. THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE BECAUSE UNIFORM APPLICATION OF FEDERAL LABOR LAW IS JEOPARDIZED BY THE DECISION BELOW.

1. The Decision Of The Court Of Appeals For The Ninth Circuit Is In Direct Conflict With The Principles Enunciated By This Court In The *Steelworkers* Trilogy, *First National Maintenance Corp.*, and *Metropolitan Edison.*

Throughout the last 35 years, beginning with the *Steelworkers* Trilogy[6] *and culminating most recently in this Court's decision in AT&T*, this Court has developed rules by which lower courts are to be guided with respect to determining the scope of arbitration clauses in labor contracts. From the advent of the *Steelworkers* Trilogy, this Court has regularly affirmed that arbitration is a matter of contract, that it is an extension of the collective bargaining process, and that this process is a means for resolving disputes over the terms and conditions of employment as defined under Section 8(d) of the NLRA. *Warrior & Gulf Navigation*, 363 U.S. at 578, nn. 3, 4. As Justice Douglas explained in the *Steelworkers* Trilogy, the arbitration procedure — and the presumption of its applicability — involve those matters subject to the "continuous collective bargaining process" under the NLRA. *Id.* at 581.

Consistent with this principle is this Court's determination that the presumption in favor of arbitrability is rebutt-

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[6] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (hereinafter *"American Mfg.," "Warrior & Gulf Navigation," or "Enterprise Wheel & Car,"* individually, or "*Steelworkers* Trilogy" collectively).

able either by express exclusions from arbitration or by other forceful evidence of an intent to exclude disputes from resolution in that forum. *AT&T*, 475 U.S. at 648-51. Equally consistent with this principle is this Court's determination that decisions to close plants are *not* part of Section 8(d)'s terms and conditions of employment over which Congress has mandated bargaining. *First National Maintenance Corp.*, 452 U.S. at 686. In *First National Maintenance Corp.*, this Court ruled that statutory rights such as closure decisions are "retained freedoms." *Id.* As such, they cannot be subject to the "continuous collective bargaining process" under the *Steelworkers* Trilogy. Such freedoms are not subject to arbitration in the absence of a "clear and unmistakable waiver." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Rather than undertake the analysis mandated by decisions of this Court, the Ninth Circuit Court of Appeals simply stated that *First National Maintenance Corp.* was not "relevant." (Appendix B, p. B-5.) This erroneous determination by the Court of Appeals is significant. The Court of Appeals for the Ninth Circuit has demonstrated that it effectively treats closure decisions as terms and conditions of employment under Section 8(d) of the NLRA, and that it considers these decisions to be subject to the arbitration provisions of collective bargaining agreements, regardless of express exclusions in management rights clauses or the absence of evidence of a waiver. Without question, this Court has ruled under *First National Maintenance Corp.* that plant closure decisions are not terms and conditions of employment; they are "retained freedoms." As such, they are not governed by the collective bargaining agreement unless waived by clear and unmistakable language or conduct. *Metropolitan Edison*, 460 U.S. at 708, n. 12.[7] In the

[7]The language of a collective bargaining agreement will effectuate a waiver only if it is "clear and unmistakable" in waiving the statutory

absence of such a waiver, there can be no agreement to arbitrate disputes about closure decisions — regardless of the terms of the arbitration clause.

By disregarding this analytical framework and simply concluding that *First National Maintenance Corp.* is not "relevant," the Ninth Circuit has committed error.

If allowed to stand, the Court of Appeals' ruling in this case will compel third-party arbitrator involvement in business decisions to close — even though companies never expressly waive the right to make these decisions and there is no contract language permitting arbitration of such decisions.[8] To cure this far-reaching harm, Petitioner submits

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right. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 722 (2d Cir. 1966). *See also NLRB v. Pepsi-Cola Distributing Co., Inc.*, 646 F.2d 1173, 1176 (6th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982); *Procter & Gamble Manufacturing Co. v. NLRB*, 603 F.2d 1310, 1317-18 (8th Cir. 1979); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 600 F.2d 918, 922-23 (D.C. Cir. 1979) (*Road Sprinkler I*); *General Electric Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

The same standard applies to conduct of the parties: whether alone or in combination with contractual language conduct can effectuate a waiver only if the party's intent to waive is clear and unmistakable from the evidence presented. *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982) (*Road Sprinkler II*); *Communication Workers Local 1051 v. NLRB*, 644 F.2d 923, 927 (1st Cir. 1981); *Procter & Gamble Manufacturing Co. v. NLRB*, 603 F.2d at 1317-18; *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129-30 (4th Cir. 1979); *Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978); *NLRB v. R.L. Sweet Lumber Co.*, 515 F.2d 785, 795 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975); *C-B Buick, Inc. v. NLRB*, 506 F.2d 1086, 1096 n.21 (3rd Cir. 1974).

It is undisputed on the record in the court below that there is no evidence of waiver.

[8]The flaw in the Court of Appeals' decision is illustrated by the impact of the precedent on other items which are not mandatory

that this Court should grant *certiorari* to harmonize the *Steelworkers* Trilogy, *AT&T*, and their progeny, with *First National Maintenance Corp.* and *Metropolitan Edison*. This is the only means by which this Court can ensure uniform application of federal labor law, as well as the protection of management's retained freedoms, when courts examine collective bargaining agreements on the threshold question of arbitrability.

B. THERE IS AN INTER-CIRCUIT CONFLICT INVOLVING THE FIRST, SIXTH, AND NINTH CIRCUITS CONCERNING THE ARBITRABILITY OF DISPUTES OVER NON-MANDATORY SUBJECTS OF BARGAINING WHICH THIS COURT SHOULD RESOLVE.

By its misapplication of *First National Maintenance Corp.* and *Metropolitan Edison*, the Court of Appeals for the Ninth Circuit is in conflict with the First and Sixth Circuit Courts of Appeals and this Court should grant *certiorari* to resolve the conflict.

1. Consistent With The Decisions Of This Court, The First And Sixth Circuit Courts Of Appeals Have Ruled That Disputes Concerning The Closing Of Businesses Are Not Arbitrable In The Absence Of A Clear And Unmistakable Waiver Of This "Retained Freedom."

The federal courts and the National Labor Relations Board continue to follow the *First National Maintenance*

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subjects of bargaining. As the dissent points out, the Court of Appeals for the Ninth Circuit now holds that there is no barrier to arbitration over any "frivolous" or alleged issue. The burden on employers in the Ninth Circuit is fantastic: Employers must now expressly exclude all management rights. This is an unwarranted burden on the bargaining process which defeats the objectives of bargaining under the NLRA.

Corp. holding.[9] Consistent with this precedent, in *International Union United Automobile Aerospace And Agriculture Implement Workers of America v. Lester Engineering Co.*, 718 F.2d 818 (6th Cir. 1983) (hereinafter "*Lester Engineering*"), the Court of Appeals for the Sixth Circuit held, *inter alia*, that, as in the instant case, where a management rights clause of an agreement reserves to the company the unilateral right to engage in management functions such as closure, the issue of closure is not arbitrable. *Id.* at 824.

In *Lester Engineering*, the issue was whether the employer could close one of its manufacturing facilities. As in the present case, the union argued that the closing was really a plant move or impermissible subcontracting in violation of the collective bargaining agreement.[10] The district court held that the decision to close was not arbitrable.

The Court of Appeals for the Sixth Circuit affirmed. In its opinion, it set forth the requisite analytical steps which courts should undertake to reach a decision under the

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[9] *See e.g., Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988) (court overturned National Labor Relations Board, holding that a company's decision to close a plant was not a mandatory subject of bargaining). *See also Dubuque Packing Co.*, 303 NLRB 386 (1991), *enforced*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 114 S.Ct. 1395 (1994), *cert. dismissed*, 144 S.Ct. 2157 (1994), *appeal after remand*, 38 F.3d 609 (D.C. Cir. 1994), 1994 U.S. App. LEXIS 28179 (D.C. Cir. 9/27/94) (affirming and explaining the Supreme Court's analysis in *First National Maintenance Corp.*).

[10] As in the present case, the arbitration clause at issue was quite broad. It defined a grievance as "a dispute between the Company and any employee in the unit, concerning the interpretation, application, or claim of breach or violations of this Agreement." *Id.* at 820. The management rights clause was specific in granting autonomy to the company to make business decisions such as the one at issue. It gave management the right to "decide the number and location of its plants; products to be manufactured; and the methods and processes of manufacturing." *Id.* at 819. This is substantially similar to the instant case.

principles of this Court enunciated over the years: (1) courts must first identify the underlying dispute and determine whether it is subject to arbitration; (2) courts must limit themselves to determining arbitrability and not the merits of the dispute; (3) courts must determine arbitrability from the collective bargaining agreement; (4) courts should read the arbitration clause of the agreement "indulgently;" and (5) courts must carefully scrutinize the management rights clause to *"minimize the potential for encroachment upon areas of exclusive management responsibility."* (Emphasis added.) *Id.* at 823-24.

Having undertaken this analysis, the Court of Appeals for the Sixth Circuit concluded:

> The decision to close is, as the District Court astutely observed, delegated to Lester under the terms of the collective bargaining agreement. The company rights clause of the agreement clearly gives Lester the unilateral right to close its facilities. Therefore, even if we read the arbitration clause broadly, we could not find the underlying dispute arbitrable.

Id. at 824. The Court noted that under *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) (hereinafter "*Darlington Manufacturing*")[11] and *First National Maintenance Corp.*, there was no presumption of arbitrability, because closure is an absolute right and not subject to the duty to bargain. *Id.* at 824, n. 3.

The Court of Appeals for the First Circuit is in accord. In *Congreso de Uniones Industriales v. V.C.S. National Packing Company, Inc.*, 756 F. Supp 69 (D. Puerto Rico 1991), *aff'd.* 953 F.2d 1 (1st Cir. 1991) (hereinafter "*V.C.S.*"), the union filed an action under Section 301 of the LMRA

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[11] In *Darlington Manufacturing*, this Court first upheld an employer's right to terminate its business. *Darlington Manufacturing*, 380 U.S. at 270.

alleging that the Company violated the collective bargaining agreement by refusing to submit the issue of plant closure to arbitration. The union sought an injunction to prevent the closing.[12]

The district court in *V.C.S.* engaged in the same analysis as the Sixth Circuit Court of Appeals in *Lester Engineering.* To determine arbitrability, the court first examined terms of the collective bargaining agreement and noted that the arbitration clause created a presumption of arbitrability. Even though the arbitration clause was broadly worded, the court examined other contractual provisions which excluded certain disputes from arbitration. The court then concluded that the dispute was not arbitrable. *Id.* at 73.

The district court explained its reasoning. First and foremost, the court noted that the CBA did not contain any clause that prohibited the employer's action. Relying on *First National Maintenance Corp.*, the court noted that employers are generally not required to bargain over closing decisions with the union. *Id.*, n. 3. The court thus concluded that "[s]ince there is no colorable claim raised under the CBA, we conclude the Union is not legally entitled to the remedies sought." *Id.* at 73-74. The Court of Appeals for the First Circuit affirmed, 953 F.2d 1 (1st Cir. 1991).

These decisions illustrate and apply the principles established by this Court which must be evaluated when deciding the question of arbitrability of closure decisions: (1) courts should examine any management rights clause to determine the parties' intent on arbitrability; (2) courts must consider and be guided by the fact that closures are non-mandatory subjects of bargaining, they are not part of the terms and conditions of employment and, therefore, they are outside

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[12]The Puerto Rico Superior Court (where the case was initially filed) refused to issue the injunction. The closing occurred and the company then removed the case to federal court.

the scope of the collective bargaining agreement unless expressly referenced therein; and (3) courts should carefully examine the parties' agreement and conduct for evidence of waiver of these retained freedoms. Given these principles, courts should conclude that the mere presence of a broad arbitration clause is not determinative or, indeed, meaningful when the issue of closure is in dispute.

The Court of Appeals for the Ninth Circuit did not undertake an analysis such as the ones in *Lester Engineering* and *V.C.S.* and it circumvented fundamental principles set forth in this Court's precedent. In so doing, it arrived at an erroneous and insupportable decision which is in conflict with the principles articulated by this Court and the First and Sixth Circuit Courts of Appeals.

C. THERE IS AN INTER-CIRCUIT CONFLICT INVOLVING THE FIRST, SIXTH, AND NINTH CIRCUITS OVER THE EVIDENCE FOR REVIEW IN ARBITRABILITY CASES.

An additional point of conflict between the Ninth Circuit Court of Appeals and the First and Sixth Circuit Courts of Appeals concerns whether, and under what circumstances, a court looks beyond the language of the arbitration clause to determine the issue of arbitrability.

In *AT&T*, 475 U.S. at 650, this Court explained unequivocally that although there is a presumption of arbitrability when an agreement contains a broad arbitration clause, that presumption is rebuttable and may be rebutted by "any express provision excluding a particular grievance from arbitration" or "the most forceful evidence of a purpose to exclude the claim from arbitration."

The decision in the court below, as well as prior decisions of the Court of Appeals for the Ninth Circuit, impermissibly narrow this holding. In contravention of the principles enunciated in *AT&T*, the Ninth Circuit has held that a court

should only look to the contract's arbitration clause — not the substantive provisions of the agreement — to determine the arbitrability of a dispute. *Christensen v. General Building Contractor, Inc.*, 952 F.2d 1073, 1077 (9th Cir. 1991). This myopic interpretation of *AT&T* and its antecedents renders meaningless the contents of any management rights clause — or any other provision — which contains express exclusions from arbitration. Indeed, this interpretation by the Ninth Circuit results in a guarantee of arbitrability for every dispute unless the arbitration clause itself contains every possible exclusion from arbitration. This precedent, as noted by Circuit Judge Kleinfeld in his dissent in the court below, is nonsensical and does not comport with the rationale and rulings of decades of decisions of this court.[13] This result — which is also at odds with the decisions of the First

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[13] Circuit Judge Kleinfeld succinctly reasoned:

> The arbitration clause says "any," as the majority correctly points out, so if our task were limited to construing the arbitration clause, any dispute whatsoever between union and management would be arbitrable. . . .
>
> But that is absurd. Any claim can be articulated as a violation of the collective bargaining agreement, if even frivolousness is no barrier. . . .
>
> The company did not, by agreeing to collective bargaining, turn over its entire management to a panel of three company and three union appointees. *The way to avoid the absurd construction is by reading the entire contract*, not just one section, and to read it all in light of the purposes it was designed to accomplish.
>
> *The "any dispute" language* was put into a contract to serve a purpose. In the context of a collective bargaining relationship, the language *implies disputes over issues which are intended by the parties to be the subject of collective bargaining.* We know that "any" does not mean, literally, "any," because the contract expressly carves out a list of management prerogatives which are not to be infringed by collective bargaining or arbitration.

(Emphasis added.) (Appendix B, pp. B-6, B-7.)

and Sixth Circuit Courts of Appeals as discussed above — warrants granting the writ of *certiorari* to resolve the conflict.

CONCLUSION

For all of the reasons stated, Petitioner respectfully requests that the Court grant the petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 18th day of July 1995.

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APPENDIX A

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890, *Plaintiffs,*

v.

NATIONAL REFRACTORIES & MINERALS, *Defendant.*

No. 93-20285 SW

United States District Court,
Northern District of California.

Argued and submitted June 1, 1993.

Decided June 25, 1993.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Before: WILLIAMS, Judge.

Union workers ("Plaintiffs") move this Court for an order of summary judgment compelling their employer, defendant National Refractories & Minerals ("Defendant"), to submit Plaintiffs' grievance to arbitration. Because the arbitration clause in the agreement between the parties is written in broad and general terms and Defendant has not presented compelling evidence of an expressed intent to exclude partial closure decisions from arbitration, the Court GRANTS Plaintiffs' motion for summary judgment and DENIES Defendant's cross-motion for summary judgment.

BACKGROUND

Among its other activities, Defendant is in the business of selling magnesia. At the time the parties entered into a collective bargaining agreement (or the "agreement"), Defendant manufactured and sold two types of synthetic mag-

nesites called KF-95 and K-grain. Defendant recently ceased, however, to manufacture synthetic magnesite and began to import natural magnesite from China.

This lawsuit attacks Defendant's decision to cease manufacturing KF-95, which constituted a decision to partially close an operation. KF-95 is a grain of magnesia used to manufacture bricks capable of withstanding tremendous temperatures. Defendant sold KF-95 to industrial users and also used KF-95 in its own brick manufacturing plants. The making, processing, and handling of KF-95 represented a significant portion of the work performed by union employees. According to Defendant, it ceased manufacture of KF-95 because it was cost prohibitive, at approximately $285/ton including freight charges. The cost of importing Chinese magnesite is much lower, at approximately $140/ton delivered. Defendant further maintains that even if labor costs were completely removed from the KF-95 production costs, the imported Chinese magnesite would still be cheaper.

The collective bargaining agreement between the parties contains, *inter alia*, a grievance and arbitration provision which requires arbitration of "any disagreement or dispute between the parties." Plaintiff argues that resolution of this dispute will require interpretation of the "Contracting out" provision of the agreement. That provision allows Defendant to hire non-union workers only for work or services not available at Defendant's plant. Agreement, Art. IX A. The agreement further provides that whenever non-union workers are employed, they must be paid similar wages and receive similar benefits as union employees. Art. IX B.

On June 18, 1992, union representative Richard Fagundes filed a grievance protesting Defendant's import of Chinese magnesite in replacement of KF-95. By letter dated October 15, 1992, Defendant denied the grievance, stating that it was not arbitrable, and refused to submit the dispute to

arbitration. Defendant's position is that the purchase of Chinese magnesite was a business decision which it is privileged to make and which does not violate the agreement. Thereafter, Plaintiffs filed this action in federal court to compel Defendant to submit this dispute to arbitration. The only question before the Court today is whether the parties agreed to resolve this dispute through arbitration, or whether the Court may serve as adjudicator. Because the merits of the case are not now before the Court, the Court will not decide whether Defendant had the right to make the decision to cease manufacture of KF-95 without interference from the union.

LEGAL STANDARDS

Summary Judgment

On a motion for summary judgment, the moving party bears "the initial responsibility of informing the district court of the basis for its motion . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. However, the moving party is not required to ***negate*** those portions of the nonmoving party's claim on which the nonmoving party bears the burden of proof. *Id.*

Once the moving party demonstrates that there is no genuine issue of material fact, the nonmoving party must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

Federal Labor Law

Section 301 of the Labor Management Relations Act ("LMRA") permits the federal courts to compel an em-

ployer to arbitrate a grievance where the relevant collective bargaining agreement contains a mandatory grievance and arbitration procedure for the resolution of disputes between the parties. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957).

Federal labor policy strongly favors resolution of labor disputes through arbitration. The United States Supreme Court has directed that "[a]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *A.T. & T. Technologies v. Communications Workers*, 475 U.S. 643, 650 (1960) (citations omitted). The Ninth Circuit further provides that the presumption of arbitrability carries particular force when the arbitration clause is written in broad and general terms. *Westinghouse v. Hanford Atomic Metal*, 940 F.2d 513, 514 (9th Cir. 1991). Indeed, where a literal reading of the collective bargaining agreement reflects that the parties have committed all disputes to arbitration, "only an express exclusion of a particular grievance or 'the most forceful evidence of a purpose to exclude the claim' from arbitration will avoid referral of a dispute to arbitration." *Christensen v. General Building Contractor*, 943 F.2d 1065, 1068 (9th Cir. 1991) (citations omitted); *see also, Building Materials & Construction Teamsters v. Granite Rock*, 851 F.2d 1190, 19984 [sic] (9th Cir. 1988) ("[w]here, as here, the parties have agreed to arbitrate all contractual disputes, the court's function is strictly limited to determining whether the union's claim on its face is governed by the contract (citations omitted]").

Finally, in making the determination of arbitrability, the court is to "look only to the contract's arbitration clause, rather than to the substantive provisions of the agreement, to determine whether a dispute is arbitrable." *Christensen v.*

General Building Contractor, 943 F.2d at 1069. The court "is not to rule on the potential merits of the underlying claims." *Id.*

DISCUSSION

Plaintiffs argue that it is entitled to summary judgment because the grievance and arbitration clause in the agreement is clear and all-inclusive, providing that "[a]ny disagreement or dispute between the parties hereto shall be handled" through the contractual grievance and arbitration mechanism. *See* Agreement, Art. XXI. As Plaintiffs correctly note, the Ninth Circuit holds that arbitration clauses written in broad and general terms, such as here, are entitled to a particularly strong presumption of arbitrability. *Westinghouse v. Hanford Atomic Metal*, 940 F.2d at 514.

The parties here, however, dispute the scope of arbitrability. Plaintiffs argue that the unambiguous language of the arbitration clause requires arbitration of any dispute arising between the parties, regardless of whether the dispute arises under the agreement. Defendant, on the other hand, argues that the arbitration clause is limited to disputes arising under the agreement.

When an arbitration clause appears unambiguous on its face, as here, the Court cannot look to the parties' bargaining history or to substantive provisions in the agreement to ascertain the scope of arbitrability. *Christensen*, 943 F.2d at 1069; *see also, Westinghouse*, 940 F.2d at 521 ("where there are no [express] exclusions from arbitration, we have limited our inquiry to the arbitration clause itself and refused to consider substantive provisions"). However, the Court can look at the language of the entire grievance and arbitration clause to ascertain whether the parties expressed an intent to exclude a particular type of claim from arbitration. *See Haig Berberian, Inc. v. Cannery Warehousemen*, 535 F. 2d 496 (9th Cir. 1976) (per curium) ("[e]vidence that the parties

intended to exclude a particular type of claim *from arbitration* may be relevant and admissible") (emphasis added).

Examination of the entire arbitration clause supports Defendant's interpretation that arbitration is required only for disputes arising under the agreement. In addition to the broad language quoted above, the arbitration clause authorizes a Joint Committee to attempt to resolve grievances prior to submission to an arbitrator. Art. XXI (A). The arbitration clause expressly provides that the Joint Committee may only "interpret and enforce this agreement" and remedy "any violations of this agreement." It follows, therefore, that arbitration is also limited to disputes arising under the agreement, since the arbitrator could not enjoy greater powers than those possessed by the Joint Committee which has initial review. Nonetheless, an arbitration clause such as this, which requires arbitration of all disputes arising under the agreement, is exactly the type of broad and general provision that the Ninth Circuit gives a stronger presumption of arbitrability. *See Westinghouse v. Hanford Atomic Metal*, 940 F.2d at 514.

Defendant has not presented compelling evidence to overcome the particularly strong presumption of arbitrability that exists in this case. Specifically, Defendant submits no evidence of an express intent to exclude a decision of partial closure from arbitration. Instead, Defendant cites *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), for the proposition that a decision of partial closure is not a mandatory subject of bargaining under the National Labor Relations Act, and argues that it would not have bargained away this right without clearly indicating its intent to do so in the bargaining agreement. However, *First National Maintenance Corp.* does not constitute the "forceful" evidence required to overcome the presumption of arbitrability here, because nothing in that decision would *prevent* an employer

from bargaining away its right to make closure decisions in its unfettered discretion.

Defendant also cites to cases decided in other circuits that have required a clear waiver in the arbitration agreement of management's right to partial closure. *See e.g., Auto Workers v. Lester Engineering Co.*, 718 F.2d 818 (6th Cir. 1983) (court held that an employer's decision to completely shut down its operations was not arbitrable under the subcontracting or plant move provisions of the agreement, where the management rights clause reserved to the employer the right to make such a decision and where the company simply ceased to exist). While this Court does not disagree with Defendant's statement of those cases, they have little relevance here. In the Ninth Circuit, unlike other circuits, it is the intent to *exclude* matters from coverage of a broad bargaining agreement that must be shown by compelling evidence of expressed intent. All matters not expressly excluded are presumed subject to the agreement. Thus, although *First National Maintenance Corp.* makes it clear that Defendant was not required to agree to arbitrate decisions of partial closure, when Defendant entered into a collective bargaining agreement containing a arbitration clause written in broad and general terms, the Ninth Circuit required that Defendant expressly state its intent to exclude partial closure decisions from the arbitration agreement.

Although it may well be that, upon consideration of the merits of the case, the arbitrator determines that Defendant can terminate a product line without penalty, "where [an] agreement calls for disputes to be arbitrated, then arbitration of even unmeritorious claims is required." *Christensen*, 943 F. 2d at 1069 (citing *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566-67); *See also A.T. & T. Technologies*, 475 U.S. at 649 ("[I]n deciding whether the parties have agreed to submit a particular grievance to

arbitration, [this] court is not to rule on the potential merits of the underlying claims.")

In addition to the argument based on *First National Maintenance Corp.*, Defendant points to other provisions in the agreement in an attempt to make a "forceful" showing that the parties intended to exclude partial closure decisions from the auspices of the agreement. For instance, Defendant points to Art. I of the agreement which limits contract coverage to employees at the Natvidad [sic] and Moss Landing plants owned by Defendant. Defendant also points to Art. IV(B) (2) which states that a union may not interfere with company discretion to purchase raw materials and may not set production goals. As Defendant concedes in its Reply, however, no language in these articles excludes the matters within their coverage from arbitration. Instead, Defendant asks the Court to "imply" such an exclusion. *See* Df. Reply at 10:15-19. An implied exclusion, however, does not constitute "forceful" evidence of the parties' intent to exclude partial closure decisions from arbitration. Absent "forceful evidence" that decisions of partial closure were exempted from the agreement, this dispute must be subjected to the grievance and arbitration process outlined in the agreement. *See Christensen v. General Building Contractor*, 943 F.2d at 1068 ("only an express exclusion of a particular grievance or 'the most forceful evidence of a purpose to exclude the claim' from arbitration will avoid referral of a dispute to arbitration." (citations omitted)).

Accordingly, Plaintiffs' motion for summary judgment is hereby GRANTED and Defendant's cross-motion for summary judgment is DENIED. Defendant is directed to submit the subject grievance to arbitration. In the event that an arbitration decision is rendered against Defendant, Defendant will of course have the opportunity to come before this

Court to challenge such decision when Plaintiffs move to confirm the arbitration award.

IT IS SO ORDERED.

APPENDIX B

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890, *Plaintiffs-Appellees,*

v.

NATIONAL REFRACTORIES & MINERALS, *Defendant-Appellant.*

No. 93-16453

United States Court of Appeals
For the Ninth Circuit.

Argued and submitted December 14, 1994.

Decided February 23, 1995.*

Before: HUG, CANBY, and KLEINFELD, Circuit Judges.

The issue in the present case is whether the district court erred by entering summary judgment in favor of General Teamsters, Warehousemen and Helpers Union, Local 890 ("the Union") on its claim that arbitration is required to resolve a grievance with National Refractories & Minerals ("the Company"). We agree with the district court that arbitration is required in this case and therefore affirm.

FACTS

The Company is in the business of, among other things, selling magnesia. Until recently, the Company produced its own synthetic magnesite. National Refractories & Minerals entered into a collective-bargaining agreement ("CBA") with General Teamsters, Warehousemen and Helpers

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Union, Local 890. Articles IX A and B, and XXV of the CBA require the Company to use union workers at its facility and to use nonunion workers only for work or services not available in the Company's work force. Further the agreement provides that if the Company contracts out, it must do so with employers who pay their employees not less than union wages and give them benefits and working conditions similar to union employees. The CBA's arbitration clause is drafted in very broad language, requiring arbitration of "any disagreement or dispute between the parties."

In an effort to reduce what it perceived as excessive production costs, the Company decided to import natural magnesite from China. This decision arguably resulted in the partial closure of the Company's manufacturing site and the layoff of some union workers. The Union filed a grievance protesting the Company's actions, claiming that the Company's decision violated Article IX and Article XXV of the CBA. The Union sought arbitration of the grievance under the terms of the CBA. The Company, for its part, denied the grievance and refused to submit the dispute to arbitration. Its position is that the decision was one reserved to management under Article IV of the CBA and not subject to arbitration. The Union filed an action in federal court seeking to compel the Company to submit the dispute to arbitration. The district court, ruling only on whether the dispute was arbitrable, granted summary judgment in favor of the Union.

I.

We review *de novo* a district court's grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). On a motion for summary judgment, the moving party bears "the initial responsibility of informing the district court of the basis for its motion."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. Once the moving party demonstrates there is no genuine issue of material fact, the nonmoving party must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. We review decisions regarding the scope of an arbitration clause *de novo*. *Christensen v. GBC*, 952 F.2d 1073, 1076 (9th Cir. 1991).

Section 301 of the Labor Management Relations Act permits the federal courts to compel an employer to arbitrate a grievance where the relevant CBA contains a mandatory arbitration process to resolve disputes between the parties. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957). Federal labor policy clearly favors resolution of labor disputes through arbitration. The United States Supreme Court has stated "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Technologies v. Communication Workers*, 475 U.S. 643, 650 (1980) (citations omitted).

Our own circuit opinions have emphasized the strong presumption of arbitrability when the arbitration clause, like this one, is written in broad and general terms. *See Westinghouse Hartford Co. v. Hanford Atomic Metal Trades Council*, 940 F.2d 513, 517 (9th Cir. 1991). Indeed, where the clause is so broad that it appears the parties have committed all disputes to arbitration, "only an express exclusion of a particular grievance or 'the most forceful evidence, of a purpose to exclude the claim' from arbitration will avoid referral of a dispute to arbitration." *Christensen v. General Bldg. Contractors*, 952 F.2d 1073, 1077 (9th Cir. 1991) (citations omitted). In determining whether a claim is

arbitrable, we "look only to the contract's arbitration clause, rather than to the substantive provisions of the agreement" and we will not rule on the potential merits of the underlying claims. *Id.*

The "dispute" in the present case is whether the company violated the terms of the CBA when it decided to import natural magnesite from China rather than continue manufacturing its own synthetic material. Whether the decision violates Article IX or Article XXV of the CBA, as the Union contends, or is an exclusive management decision under Article IV of the CBA, as the Company contends, requires an interpretation of the CBA.

The very broad arbitration clause of Article XXI of the CBA, which covers "any disagreement or dispute between the parties," may be limited by the subsections of that article to matters that may be brought before the Joint Committee on Contract Administration. Even so, Article XXI(C) makes it clear that this includes "the power to interpret and enforce the agreement." It is clear that the dispute requires an interpretation of the agreement, and thus is subject to the arbitration clause of Article XXI.

The Company's arguments that the court should look to other provisions of the CBA to find an implied intent to exclude the dispute from the broad provisions of the arbitration clause, or to look to the collective-bargaining history, are unpersuasive. The Supreme Court made it clear in *AT&T Technologies*, as previously stated, that an order to arbitrate "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 475 U.S. at 650. That surely cannot be said in this case.

The Company's reliance on *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) is misplaced. That case involved a question of whether a plant closure decision was a

mandatory subject of bargaining. The question here is whether a dispute under an existing collective-bargaining agreement is subject to arbitration. Management may not have a statutory duty to bargain about a subject, and yet may have entered into a collective-bargaining agreement that relates to that subject and requires mandatory arbitration to interpret the contractual provisions. *The First National* decision is therefore not relevant to this case.

CONCLUSION

The decision of the district court granting summary judgment in favor of Local 890 on its action to compel National Refractories & Minerals to arbitrate the present dispute is affirmed. The Union's request for attorneys' fees and double costs is denied.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In my view, the presumptions and rules of construction do not point one way or the other in this case, because they conflict. On the one hand, as the majority correctly points out, arbitration is favored and doubts should be resolved in favor of coverage. On the other hand, a company waives its right not to bargain over non-mandatory subjects only by "clear and unmistakable language." *Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. 693, 708 (1983). A decision whether to shut down part of its business is not among the issues for which Congress has mandated collective bargaining. *First Nat'l Maintenance Corp. v. National Labor Relations Board*, 452 U.S. 666, 686 (1981). Although the majority is correct that the arbitration clause must be read broadly, "the management prerogative clause should also be carefully scrutinized to minimize the potential for encroachment upon areas of exclusive management

responsibility." *International Union United Automobile, etc. Workers v. Lester Engineering Co.*, 718 F.2d 818, 823-24 (6th Cir. 1983).

The majority errs, I think, in concluding that arbitrability is itself to be decided by the arbitrators. The district court is required to decide arbitrability independently, and we are required to review the summary judgment de novo, based on our interpretation of the agreement. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (internal quotations omitted). We are required to interpret the collective bargaining agreement to decide whether the parties intended to arbitrate grievances of the kind at issue. *Id.* at 651.

The arbitration clause says "any," as the majority correctly points out, so if our task were limited to construing the arbitration clause, any dispute whatsoever between union and management would be arbitrable. It is well established that even frivolousness is no barrier to arbitrability. *Building Materials and Constr. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1194 (9th Cir. 1988). Without even frivolousness as a limitation, and with a contract providing for arbitration of "any disagreement or dispute," there would be no barrier to arbitration of anything.

But that is absurd. Any claim can be articulated as a violation of the collective bargaining agreement, if even frivolousness is no barrier. The vice president's compensation package; whether the president gets the corner office and best parking spot; whether executives get private washrooms down through the vice president level; whether management should borrow money from one bank or another, or issue preferred stock or subordinated debentures,

would all be arbitrable. So would whether the company buys a dolomite quarry, or sells one. So would whether the company stays in business.

The company did not, by agreeing to collective bargaining, turn over its entire management to a panel of three company and three union appointees. The way to avoid the absurd construction is by reading the entire contract, not just one section, and to read it all in light of the purposes it was designed to accomplish.

The "any dispute" language was put into the contract to serve a purpose. In the context of a collective bargaining relationship, the language implies disputes over issues which are intended by the parties to be the subject of collective bargaining. We know that "any" does not mean, literally, "any," because the contract expressly carves out a list of management prerogatives which are not to be infringed by collective bargaining or arbitration.

The contract expressly excludes from collective bargaining and arbitration decisions including the one at issue in this case, in section B(2) of the management autonomy section of the agreement:

Article IV — Management Responsibilities

A. The Employer shall determine the competency and fitness of prospective Employees and the satisfactory performance of work by any Employee, and may discharge any Employee whose work is unsatisfactory or who fails to observe the safety precautions or other rules and regulations prescribed by the Employer for health, safety, and protection of its Employees.

1. Any Employee, except a probationary employee, who is aggrieved by the operation of this Article, may proceed as specified under Article XXI —

GRIEVANCE AND ARBITRATION of the Agreement.

B. The number of persons to be employed is also at the discretion of the Employer, and the fact that certain classifications and rates are established does not mean that the Employer must assign persons to such classifications or staff any particular part of the Plant that happens to be on the site, unless the Employer has need of Employees in such classifications.

1. No Employee shall be required or permitted to work alone on any work where the fact that he is working alone will constitute a safety hazard.

2. The Employer shall not be hindered or prevented from using any type or quantity of machinery, materials, or appliances; nor shall the Union attempt to regulate production at any of the plants or quarry.

3. The Employer shall make every reasonable effort to avoid the use of materials, supplies, and equipment which will tend to cause injury to the health of the workmen; and specifically, will not use red lead or chromate of lead for spray painting.

Section (B)(2) controls. The company is entitled to buy the Chinese magnesite, and it is entitled to discontinue production of the commercially obsolete synthetic substitute at its Natividad and Magnesia plants. It expressly and specifically carved this area of autonomy out of the collective bargaining relationship in Section (B)(2).

If the words leave room for doubt, that doubt is resolved by considering the purposes behind them. The purpose of the contracting out provision is generally to prevent the company from diverting work from union labor in its employ to labor outside the bargaining unit. The purpose of the management prerogatives provision is to reserve essential aspects of the conduct of the business for exclusive manage-

ment control, in order to protect the stockholders of the company from union demands which might put it out of business.

The Supreme Court has decided that a company has no duty to bargain collectively about its decision "whether to shut down part of its business." *First Nat'l*, 452 U.S. at 686. A decision "involving a change in the scope and direction of the enterprise, is akin to a decision whether to be in business at all." *Id.* at 677.

The facts in this case, and the contract language, make it like *First National.* The company used to make synthetic magnesia from dolomite. That is now a waste of time and money. The company is not buying what it used to make from a source outside the bargaining unit. The industry has changed, because of the commercial emergence of China. China sells natural magnesite which is cheaper and better than the synthetic imitation which the company used to make. The part of the company's business which formerly made the synthetic has been shut down. They might as well be making girdle stays of baleen. The *First National* decision, and the management responsibilities section of the contract, protect the company from having its present workers drain its resources away from its shareholders and its future workers for this commercially pointless exercise.

APPENDIX C

GENERAL TEAMSTERS,
WAREHOUSEMEN AND HELPERS
UNION, LOCAL 890,
Plaintiff-Appellee,

v.

NATIONAL REFRACTORIES &
MINERALS, a corporation,
Defendant-Appellant.

No. 93-16453

D.C. No. CV-93-20285-SW

United States Court of Appeals
For the Ninth Circuit.

Decided April 19, 1995.

ORDER

Before: HUG, CANBY, and KLEINFELD,
Circuit Judges.

Judge Hug and Judge Canby have voted to deny appellant's petition for rehearing, and Judge Kleinfeld has voted to grant appellant's petition for rehearing. Judge Hug and Judge Canby have voted to reject the suggestion for rehearing en banc, and Judge Kleinfeld has voted to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

APPENDIX D

AGREEMENT

between

NATIONAL REFRACTORIES & MINERALS CORPORATION

and

MONTEREY/SANTA CRUZ COUNTIES
BUILDING AND CONSTRUCTION TRADES COUNCIL

and the

INTERNATIONAL AND LOCAL UNIONS

Representing Employees of the
Natividad and Magnesia Plants

July 1, 1988

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ARTICLE I — COVERAGE AND UNION SECURITY

A. This Agreement covers all production and maintenance Employees of National Refractories & Minerals Corporation at its Dolomite Plant and Quarry at Natividad, California and its Magnesia Plant at Moss Landing, California, excluding Superintendents, Assistant Superintendents, Civil Engineers and their helpers and other professional employees, timekeepers, guards, and messengers, and employees in units certified as separate units by the National Labor Relations Board or units heretofore covered by separate collective bargaining agreements.

1. All Employees shall be required to become members of the appropriate Union on or after the 31st day from the beginning of such employment or date of transfer to the jurisdiction of said Union, or from the execution date of this ARTICLE, whichever is the latter, and to maintain membership in the Union thereafter during the life hereof as a condition of employment.

2. The Employer shall report the names of new Employees to the Union having jurisdiction within three (3) days after such Employees have been hired. When additional Employees are needed, the local Union shall be notified and given three (3) days, excluding Saturday, Sunday and holidays, to refer qualified applicants to the Employer before any new hires are made.

3. It is understood that when applicants have been referred by the Union to the Employer, the selection for referral by the Union of such applicants for employment shall be on a non-discriminatory basis and shall in no way be affected by Union membership, bylaws, rules, regulations, constitutional provi-

sions, or any other aspect or obligation of Union membership, policies, or requirements. It is further understood that the Employer retains the right to reject any and all job applicants who have been referred by the Union, and the Employer shall be the sole judge of the qualifications of such applicants for employment. Further, the Employer and the Union shall post, in such places as notices to Employees or applicants for employment are customarily posted, copies of all provisions and regulations of the Employer or Union, or both, relating to the hiring of Employees under this Agreement.

4. The first sixty (60) calendar days of employment shall be considered as a probationary period; and during such probationary period, an Employee may be transferred or terminated at the discretion of the Employer. In the event of discipline within the probationary period, the Employer shall notify the local Union in writing.

5. It is agreed that summer hires who are hired as "Temporary Summer Employees" to work between June 1st and September 1st, shall be advised in writing, by the Employer, at the time of their employment as to the duration of the Employee's employment and the Employee shall acknowledge same with his signature.

   The appropriate Union shall be given a copy of the letter. All other provisions of the Agreement shall apply after the probationary period except that they shall have no seniority with regard to regular plant Employees, and they shall not be allowed to bid on jobs; but shall be utilized for vacation relief.

B. This ARTICLE I shall be operative only to the extent of its compliance with the provisions of the National

Labor Relations Act, as amended. This ARTICLE has been modified so as to comply with the provisions of the National Labor Relations Act, as amended, and shall be construed and interpreted in accordance with all applicable present and future interpretive rulings, regulations, or decisions of the National Labor Relations Board or the courts.

ARTICLE IV—MANAGEMENT RESPONSIBILITIES

A. The Employer shall determine the competency and fitness of prospective Employees and the satisfactory performance of work by any Employee, and may discharge any Employee whose work is unsatisfactory or who fails to observe the safety precautions or other rules and regulations prescribed by the Employer for health, safety, and protection of its Employees.

1. Any Employee, except a probationary Employee, who is aggrieved by the operation of this Article, may proceed as specified under ARTICLE XXI — GRIEVANCES AND ARBITRATION of the Agreement.

B. The number of persons to be employed is also at the discretion of the Employer, and the fact that certain classifications and rates are established does not mean that the Employer must assign persons to such classifications or staff any particular part of the Plant that happens to be on the site, unless the Employer has need of Employees in such classifications.

1. No Employee shall be required or permitted to work alone on any work where the fact that he is working alone will constitute a safety hazard.

2. The Employer shall not be hindered or prevented from using any type or quantity of machinery, materials, or appliances; nor shall the Union at-

tempt to regulate production at any of the plants or quarry.

3. The Employer shall make every reasonable effort to avoid the use of materials, supplies, and equipment which will tend to cause injury to the health of the workmen; and specifically, will not use red lead or chromate of lead for spray painting.

ARTICLE IX — CONTRACTING OUT

A. Production and Maintenance Work

1. Maintenance and production work shall continue to be performed by Bargaining Unit Employees. However, the Employer shall be permitted to use outside Contractors for production and maintenance work under the following circumstances:

   a. Special equipment is not available at the plant or cannot be obtained without outside manning, or

   b. Specialized skills required for certain jobs are not available within the plant work force, or

   c. Due to extraordinary emergencies due to flood, fire, earthquake, or any other situation that the Joint Committee on Contract Administration may prescribe in order to keep the plant operating efficiently.

2. The Employer agrees that when contracting out work as permitted by A.1 above, it will contract only with employers who pay and provide their employees engaged in such work not less than the wages, fringe benefits and working conditions paid to employees under this agreement performing comparable work.

3. The Employer agrees that it shall not contract out any production or maintenance work pursuant to the above provisions until all employees on layoff in the appropriate job classification have been rehired.

B. Construction Work

1. Any construction work performed by the Employer using its own employees shall be covered by the terms and conditions of this agreement.

2. Any construction work which is contracted out shall be let only to a person or firm or corporation which pay the wages, fringe benefits, and working conditions prevailing for similar work under collective bargaining agreements with the appropriate Unions party to this agreement or affiliated with the Building and Construction Trades Council of Monterey/ Santa Cruz Counties.

3. The Company agrees to notify the Executive Secretary of the Monterey/Santa Cruz Counties Building and Construction Trades Council and Local Unions affected by certified mail whenever there are to be any contractors on the plant site. Such notification shall contain the name of the contractor, the general nature of the work to be performed, and the date the project is to commence.

ARTICLE XXI — GRIEVANCE AND ARBITRATION

A. Any disagreement or dispute between the parties hereto shall be handled as set forth below:

1. Step One: The grievance shall first be presented, either orally or in writing, through the injured Employee, Union Steward and/or Business Manager and/or his assistant to the Employer within thirty (30) calendar days after the occurrence which gave rise to the grievance, or within thirty (30) calendar

days of the date when the grievant should have known of the occurrence. The Employer Representative shall respond in writing within ten (10) calendar days after receipt of the written grievance, or else the grievance shall be deemed settled in favor of the grievant. If the Employer timely denies the grievance, the grievant may then proceed, within ten (10) calendar days after receipt of the denial, to proceed to Step Two as provided herein below.

2. Step Two:

A. The parties agree that a Joint Committee on Contract Administration (hereinafter "Joint Committee") shall be appointed by the parties to consist of six (6) members, three (3) to be appointed by the Employer and three (3) to be appointed by the Union. Two (2) alternate members shall also be appointed, one (1) by the Employer and one (1) by the Union, to serve in case of absence or inability to act by their respective principals. The Joint Committee shall establish its meeting time and date and shall meet on a monthly basis unless there is no business for the Joint Committee to consider. The Joint Committee shall have the power and authority to implement such procedural rules as are necessary to perform as an effective committee. The Secretary shall advise all local Unions and the Employer of the next meeting at least ten (10) calendar days prior to the meeting. Any party to this agreement which submits a grievance to the Joint Committee must do so in writing at least five (5) calendar days prior to the meeting except by mutual agreement between the Employer and the Union.

B. All matters coming before the Joint Committee shall be decided by majority vote. Four (4) members of the Committee, two (2) from each of the parties hereto, shall be a quorum for the transaction of business but each party shall have the right to cast full vote of its membership, and it shall be counted as though all were present and voting. All decisions of the Joint Committee shall be final and binding and may be enforced in court as an arbitration award within the meaning of the Code of Civil Procedure of the State of California.

C. The Joint Committee shall have the power to interpret and enforce this agreement; to devise an appropriate remedy to correct any violations of this agreement, including, but not limited to, the assessing of damages, and issuing orders requiring any party hereto to cease and desist from any further violations of this agreement. All notices to parties regarding hearings before the Joint Committee shall be sufficient if sent by ordinary mail to the party's last known address.

D. In the event the Joint Committee is unable to reach a decision on a grievance or other matter submitted to it, either party can move the matter to Step Three, within ten (10) calendar days after the deadlock at Step Two, or to a mutually agreed-to time period.

3. Step Three:

A. A grievance referred to Step Three shall be finally resolved by either the permanent bench arbitrator or an arbitrator selected for the mat-

ter as provided below. In either case, the decision shall be final and binding.

B. The permanent bench arbitrator shall be selected by the Joint Committee and shall serve at the pleasure of the Joint Committee. It is agreed that the permanent bench arbitrator shall serve until dismissed. It is understood that either party may discharge the permanent bench arbitrator upon thirty (30) calendar days written notice. As soon as possible after the notice, a new permanent bench arbitrator shall be selected by the Joint Committee. The Employer or the Union(s) involved in the grievance may elect to reject the use of the bench arbitrator. If either party does not agree to a bench arbitrator, the grievance will be resolved by an arbitrator selected as provided in "C" hereinbelow. If the parties mutually agree to have the grievance decided by the permanent bench arbitrator, the grievance will proceed as an expedited arbitration, without transcripts or written argument. The permanent bench arbitrator shall be immediately notified and a hearing held within thirty (30) calendar days of the deadlock, and the decision shall be rendered at the conclusion of the hearing, if possible, and no later than ten (10) calendar days from the hearing date.

C. If the parties do not agree to submit the grievance to the permanent bench arbitrator, the grievance shall be presented to an arbitrator selected as follows. If a mutually-acceptable arbitrator cannot be selected, either party may request the Federal Mediation and Conciliation Service to submit the names of seven (7)

persons qualified to act as arbitrators. When said list has been received, each party to the dispute shall select therefrom one (1) arbitrator by alternately deleting names from the list until a last name remains, the parties drawing lots to determine who shall be entitled to the first deletion. The remaining, or seventh person shall be selected as the arbitrator. All costs of the arbitrator and arbitration proceedings shall be borne equally by the parties to the dispute. Attorney's fees and other litigation expenses shall be borne by each individual party provided such expenses have not been a part of the arbitration award.

D. When any matter in dispute has been referred to the arbitrator for adjustment, the provisions and conditions prevailing prior to the time such matter arose shall not be changed or abrogated until a decision has been rendered by the arbitrator.

E. It is further agreed by the Employer and the Union that when a jurisdictional difference or differences arise between the members of two or more International Unions covered by this Agreement, and the International Presidents of the organizations have officially notified the local Unions that the jurisdictional difference or differences have been adjusted, and the local Unions are in accord with the decision reached and will notify their members accordingly, and the local Unions notify the Employer of the action of the International Presidents, the Employer and the said Unions will not carry out an employment policy which is in conflict with such decision.

In the absence of a decision reached by the International Unions referred to, the Contract Administration Committee shall appoint a three-(3)-man committee composed of representatives of Unions not a party to the controversy. The decision shall be referred to the International Unions involved and such decision shall stand unless reversed by a joint statement of the International Presidents involved. It is understood that the Company shall incur no liability for retroactive wages should the decision of the Contract Administration Committee be reversed by the International Presidents, but will abide by that decision upon its receipt; further, this section of the contract is not applicable for work performed in an emergency.

ARTICLE XXIV — NO STRIKE OR LOCKOUT

A. It is specifically agreed, among all the parties hereto, that there shall be no lockouts of any kind or for any cause on the part of the Employer; and there shall be no strikes or other cessation of work of any kind by the Employees on account of any controversy arising under the terms of this Agreement; nor shall there be a concerted strike or cessation of work on account of sympathy or otherwise which shall be participated in by the said Unions during the existence of this Agreement or any extension thereof. It is expressly understood that any Employee or group of Employees who, acting independently of their Union(s), attempt to create a strike or in any manner whatsoever cause a cessation of work of any kind shall be subject to discharge for just cause.

B. It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an Employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's place(s) of business.

The Union may nevertheless be permitted to utilize the grievance procedure in the event the Company takes any action against an Employee under this section.

ARTICLE XXV — GENERAL PROVISIONS

A. The provisions of this Agreement shall be binding on the Employer's successors, assigns, and purchasers and lessees of the Employer's facilities covered by this Agreement.

B. It is understood that the Employer shall not permit anyone exempted from membership in the Bargaining Unit to do work customarily performed by a member of the Bargaining Unit, except in an emergency or for training purposes. Emergencies shall not be loosely construed as mere convenience or expedience.

ARTICLE XXVI — EFFECT OF AGREEMENT

A. It is understood that this Agreement supersedes the Master Agreement dated July 1, 1985; further, it is understood and agreed by and between the parties hereto that this Agreement constitutes an Agreement covering all the operations of the Employer at its Dolomite Plant and Quarry at Natividad, California, and its Magnesia Plant at Moss Landing, California, other than construction and/or units mentioned in Article I hereof; and Employer promises and agrees not to enter into any separate contracts with any Union,

whether or not a party to this Agreement, with respect to any classification of employment included in Exhibit "A" hereto attached or which may be subsequently added, without the concurrence of the Monterey/Santa Cruz Counties Building and Construction Trades Council, AFL-CIO.

B. It is agreed and understood between the parties hereto that this Agreement and the schedules hereto attached contain all the covenants, stipulations, and provisions agreed upon by the parties hereto; and no agent or representative of either party has authority to make — and said parties shall not be bound by nor liable for — any statement, representation, promise, inducement, or agreement not set forth herein; any provision in the working rules of any Union a party hereto, with reference to relations between Employer and the Employees not expressly reaffirmed in this contact shall be deemed to be waived, and any such rules or regulations which may be hereafter adopted by any Union shall have no application to the work hereunder.

C. It is, however, agreed that any Letters of Understanding between the Employer and any of the individuals Unions may be needed from time to time to address individual problems not covered by the Contract. Any such Understanding agreed upon shall not create a hardship or cause a problem to be created for another individual Union. In the event a hardship or problem arises due to a Letter of Understanding, the Understanding shall be reviewed by the Contract Administration Committee.

D. Letters of Understanding are an extension of this Agreement and as such are subject to all of the terms and conditions of the Agreement.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890

Plaintiff,

vs.

NATIONAL REFRACTORIES & MINERALS,

Defendant.

Case No.: C-92 4922-EFL

DECLARATION OF DON VORWERCK IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Date: April 23, 1993
Time: 10:45 a.m.
Place: Courtroom 4

I, Don Vorwerck, declare:

1. I am the Superintendent of Employee Relations of National Refractories & Minerals ("National Refractories" or "Company") in Moss Landing, California, defendant in the above-captioned case. In my capacity with National Refractories, I am familiar with the Company's production needs, and strategy for deployment of production line personnel. I am also familiar with the negotiations between the Company and Teamsters Local 890 for collective bargaining agreements covering the Moss Landing magnesia plant and the Natividad plant. I participated as an employer representative at all negotiating sessions for collective bargaining agreements and wage reopeners during the 1974, 1976, 1979, 1982, 1985, 1988, 1991, and 1992 negotiations. I am

also an employer representative on the Joint Committee on Contract Administration ("Joint Committee") which administrates and resolves grievances under the Agreement. I make the following statements of my own personal knowledge except as expressly indicated as being on information and belief, and I could competently testify thereto if called as a witness.

2. I participated as an employer representative during the 1991 negotiations between the parties for a new collective bargaining agreement. Attached hereto as Exhibit A is a true and correct copy of the Letter of Understanding dated July 1, 1991, which extended the principal terms and conditions of the 1988-91 Agreement. I also participated in negotiations for the 1991 and 1992 wage reopeners.

3. I participated as an employer representative during the 1988 negotiations between the parties for a new collective bargaining agreement. Attached hereto as Exhibit B is a true and correct copy of the July 1, 1988 agreement.

4. I participated as an employer representative during the 1982 negotiations between the parties for a new collective bargaining agreement. Attached hereto as Exhibit C is a true and correct copy of the July 1, 1982 agreement.

5. During negotiations for the 1982 agreement, the parties eliminated the October 2, 1974 construction letter and the old Article IX entitled "Construction and Additions" and replaced it with the present language of Article IX, entitled "Contracting Out." A true and correct copy of the July 1, 1974 agreement is attached hereto as Exhibit D. A true and correct copy of the October 2, 1974 Construction Letter is attached hereto as Exhibit E.

6. I participated as an employer representative during the 1974 negotiations between the parties for a new collective bargaining agreement. During the 1974 negotiations, the parties eliminated the February 26, 1953 letter of under-

standing which defined "construction" for the purpose of limiting contracting out of construction work. A true and correct copy of the February 26, 1953 letter of understanding is attached hereto as Exhibit F.

7. Article I, "Coverage and Union Security," subsection A, has always been a part of the Agreement since I have been present at negotiations. Article I has applied the Agreement to National Refractories employees at the Dolomite Plant and Quarry at Natividad, California, and the Magnesia Plant at Moss Landing, California. During all of the negotiations to which I have been present, none of the parties have ever discussed applying the Agreement to individuals working outside of these two locations.

8. Article XXI, "Grievances and Arbitrations," subsection 2(c), has always been a part of the Agreement since I have been present at negotiations. Article XXI and has limited the powers of the Joint Committee on Contract Administration. The Joint Committee only has "the power to interpret and enforce this agreement." During all of the negotiations to which I have been present, none of the parties have ever asserted that an arbitrator would have powers broader than those of the Joint Committee to decide disagreements or disputes outside the four corners of the Agreement.

9. Article IV, "Management Responsibilities," Section B, has always been a part of the Agreement since I have been present at negotiations. Article IV, Section B has reserved for management the sole discretion to staff the plant. Under Section B(2), the employer has the sole discretion to use any type of raw materials that it chooses, and the unions have agreed to refrain from attempts to regulate production. During all of the negotiations to which I have been present, none of the parties have ever asserted that these management rights may be abrogated in any way or that they are subject to arbitration.

10. During the aforementioned negotiations of 1974 through the present, limits on contracting out have always been discussed as limits on National Refractories ability to subcontract unit work occurring on Company property. There have never been any restrictions placed on the purchase of raw materials mined elsewhere to replace synthetic material produced onsite.

11. During the negotiations from 1974 to the present, neither party expressed the intent that the "contracting out" provision of Article IX or the limits expressed in Article XXV(B) would abrogate management's right to decide to partially close a product line. During those negotiations, neither party expressed the intent that the Company's right to partially close a product line should be a bargainable subject.

12. As a twenty-two (22) year member of the Joint Committee, I have never heard either party argue that a Company decision to discontinue a product line should be arbitrable, until Richard Fagundes of Teamsters Local 890 raised the issue in 1992. The Teamsters Union and the other unions signatory to the Agreement failed to grieve the Company's decision to discontinue the K-grain product line in September 1991. Five employees were laid off as a result of the shutdown.

13. On June 16, 1992, during wage reopener negotiations with the local unions, Teamsters Business Agent Richard Fagundes requested information from the Company concerning its decision to purchase Chinese magnesite. The Company complied with Mr. Fagundes' request. A true and correct copy of the Company's written response is attached hereto as Exhibit G.

14. On June 18, 1992, the Teamsters asserted a grievance against Defendant alleging Defendant was in breach of

the Agreement. A true and correct copy of the Plaintiff's grievance letter is attached hereto as Exhibit H.

15. In a June 24, 1992 letter, Defendant informed Plaintiff that it would not participate in grievance proceedings because it did not believe that the grievance was arbitrable. A true and correct copy of Defendant's letter is attached hereto as Exhibit I.

16. The Company reiterated its position in an October 15, 1992 letter to the Union. A true and correct copy of Defendant's letter is attached hereto as Exhibit J.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and is executed on March 29, 1993 at Moss Landing, California.

Donald A. Vorwerck*

* Attachments noted in Vorwerck declaration are not included in Appendix E, but may be supplied at the Court's request.

(2)

Supreme Court, U.S.
FILED
AUG 14 1995
CLERK

No. 95-104

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NATIONAL REFRACTORIES & MINERALS CORPORATION,

Petitioner,

v.

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 1995

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QUESTIONS PRESENTED

Did the court below act properly by applying well-settled legal principles favoring the arbitration of labor disputes and compelling arbitration of a union's grievance challenging an employer's alleged diversion of bargaining unit work, where the relevant collective bargaining agreement contains a broad arbitration clause covering all disputes arising thereunder and where there was no forceful evidence of an intent to exclude the dispute from arbitration?

Is the established presumption favoring the arbitration of labor disputes converted into a presumption against arbitration whenever the employer characterizes the dispute sought to be arbitrated as one involving a nonmandatory subject of bargaining?

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STATEMENT OF THE FACTS

National Refractories mines and processes minerals and produces ingredients used in turn to create bricks capable of withstanding tremendous temperatures. It both sells these ingredients to industrial customers and also uses them in its own brick manufacturing plants. The Union represents the Company's employees who mine raw materials for, process and handle the Company's products. (App. A-2.)

The Company and the Union are parties to a written collective bargaining agreement containing a mandatory grievance and arbitration provision for the resolution, by its terms, of "any disagreement or dispute between the parties." The final step in the dispute resolution procedures is arbitration by a neutral arbitrator, whose decision is final and binding upon the parties. (App. D-8 through D-13.)

The collective bargaining agreement also contains, *inter alia*, a provision (Article IX) requiring that "maintenance and production work shall continue to be performed by Bargaining Unit Employees," and imposing strict limitations upon the conditions under which the Employer may use anyone other than bargaining unit employees to perform bargaining unit work. (App. D-7, D-8.) Another provision of the agreement (Article XXV) seeks to preserve the work of the bargaining unit by specifying "that the Employer shall not permit anyone exempted from membership in the Bargaining Unit to do work customarily performed by a member of the bargaining unit, except in an emergency or for training purposes." (App. D-14.) Finally, Article IV - "Management Responsibilities" - provides, *inter alia*, that "[t]he Employer shall not be hindered or prevented from using any type or quantity of machinery, materials, or appliances; nor shall the Union attempt to regulate production at any of the plants or quarry." (App. D-6, D-7.)

Prior to the events giving rise to the Union's grievance, one of the ingredients the Company manufactured was a synthetic magnesia known as KF-95, produced by mining raw dolomite, mixing it with sea water, and superheating it. The mining and processing of

the dolomite and manufacture and handling of the resultant KF-95 represented a significant portion of the bargaining unit work performed by employees represented by the Union. (Cert. Pet. p. 3; App. A-2, B-2.)

During 1992, a dispute arose between the parties to the agreement concerning the Company's substitution of natural magnesite purchased from (and mined and processed in) the People's Republic of China, in place of the KF-95 produced by bargaining unit members, which substitution resulted in the layoffs of several employees. The Union filed a grievance claiming that the Company's development and continuation of this practice constituted a diversion or substitution of work assigned to the bargaining unit to individuals not covered by the agreement (*i.e.*, those in China), in violation of the work preservation provisions of Articles IX and XXV. The Company denied that it was in violation of the parties' collective bargaining agreement, claiming that the purchase of such materials from China was a business decision it was privileged to make under Article IV, the management responsibilities clause of the agreement. (App. A-2, A-3, B-2.) The merits of the dispute between the parties thus called for an interpretation and determination of the interplay between the management prerogative language in Article IV on one hand, and the work guarantees given to bargaining unit employees in Articles IX and XXV on the other.

The Union demanded arbitration of the dispute, and the Company refused to submit the dispute to arbitration. The Union then filed suit in the United States District Court for the Northern District of California to compel arbitration. (App. A-2, B-2.)

DECISIONS OF THE COURTS BELOW

The district court found that a strong presumption of arbitrability arose from the broad and general language of the arbitration clause, that the Company had failed to come forward with forceful evidence of an intent to exclude the dispute from arbitration, and accordingly it granted the Union's petition to compel arbitration. (App. A-1 through A-9.) The Company appealed the district

court's decision to the Ninth Circuit, which affirmed. (App. B.) Succinctly stated, the basis for the Ninth Circuit's decision was its determination that (App. B-4):

> Whether the decision violates Article IX or Article XXV of the [collective bargaining agreement ("CBA")], as the Union contends, or is an exclusive management decision under Article IV of the CBA, as the Company contends, requires an interpretation of the CBA . . . and thus is subject to the arbitration clause of Article XXI.

The Ninth Circuit found the Company's reliance on *First National Maintenance Corp. v. NLRB*, 452 U.S. 66 (1981), to be "misplaced" on the following grounds (App. B-4, B-5):

> [*First National*] involved a question of whether a plant closure decision was a mandatory subject of bargaining. The question here is whether a dispute under an existing collective-bargaining agreement is subject to arbitration. Management may not have a statutory duty to bargain about a subject, and yet may have entered into a collective-bargaining agreement that relates to that subject and requires mandatory arbitration to interpret the contractual provisions. The *First National* decision is therefore not relevant to this case.

Circuit Judge Kleinfeld dissented. (App. B-5 through B-9.) The dissenting judge interpreted Article IV of the agreement to constitute an implied limitation upon the otherwise unqualified work preservation provisions relied upon by the Union. Relying on the language of Article IV, and not the grievance and arbitration provisions, the dissent concluded that "the contract expressly carves out a list of management prerogatives which are not to be infringed [upon] by collective bargaining or arbitration." (App. B-7).

The Ninth Circuit denied the Company's petition for rehearing and suggestion for rehearing *en banc*, and the petition for certiorari followed thereafter.

REASONS FOR DENYING THE PETITION

A. This Case Presents No Novel Questions Warranting This Court's Review

The disposition below represents the application of settled law to an unexceptional factual pattern that presents no novel questions warranting this Court's review. Both the district court and the Ninth Circuit have followed an unswerving line of decisions spanning nearly forty years, in which this Court has laid out the principles to be applied by a court presented with a petition to compel arbitration of a grievance under a collective bargaining agreement.

In 1957 the Court determined that Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), authorized the issuance of an order compelling an employer to arbitrate a grievance where the relevant collective bargaining agreement contains a mandatory grievance and arbitration procedure for the resolution of disputes between the parties. *Textile Workers v. Lincoln Mills*, 353 U.S. 447, 450-51 (1957). Three years later the Court recognized the existence of a federal labor law policy strongly favoring resolution of labor disputes through arbitration. As summarized in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960):

> An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

In subsequent years this principle has been repeatedly recognized and reaffirmed by the Court. See, *Wiley & Sons v. Livingston*, 370 U.S. 543 (1964); *Operating Engineers v. Flair Builders*, 406 U.S. 487 (1972); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974); *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).

The presumption in favor of arbitrability carries particular force when the arbitration clause is written in broad and general terms calling for the submission to arbitration of "all disputes arising under the agreement." *A.T.& T. Technologies v. Communications Workers*, 475 U.S. 643, 650 (1986). When a literal reading of the collective bargaining agreement reflects that the parties have committed all disputes to arbitration, only an "express provision excluding a particular grievance from arbitration, . . . [or] the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *A.T.& T., supra*, 475 U.S. at 650, quoting *Warrior & Gulf, supra*, 363 U.S. at 584-585.

Finally, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *A.T.& T., supra*, 475 U.S. at 649. "Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the courts asked to order arbitration, but as the parties have agreed, by the arbitrator." *A.T. & T., supra*, 475 U.S. at 649-50. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

The courts below applied the foregoing well-settled principles in compelling arbitration in this case. As we have said, the dispute between the parties is whether Article IV of the agreement vali-

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[1] There is simply no room within this analytical framework for the reasoning of the dissent in the court below, which bases its conclusion against arbitration on an interpretation of the contract language addressed to the merits of the dispute. See *A.T.& T., supra*, 475 U.S. at 651; see also Justice Brennan's concurrence at pp. 654-655.

dates the Company's decision to cease certain operations historically performed by bargaining unit employees, and arrange to have that work done elsewhere, notwithstanding the work preservation language in Articles IX and XXV. This is certainly a dispute that fits comfortably within the provisions of the agreement referring *all* disputes of contract interpretation for resolution through its grievance and arbitration procedures. Thus, the strong presumption favoring arbitration adheres and can be overcome only by the "most forceful" evidence of a purpose to exclude this dispute from arbitration. *A.T.& T., supra*, 475 U.S. at 650. Further, as both courts below found, nothing in the record herein comes close to "forceful evidence" of an intent to exclude the Union's grievance from arbitration. At best, the Company asked the courts below to "imply" an exclusion by interpreting contractual language and bargaining history in a manner that preempts the arbitrator's function. This the courts below quite properly declined to do.[2]

B. The Presumption Favoring Arbitrability of Labor Disputes is Not Affected by Characterizing a Dispute as Involving a Non-Mandatory Subject of Bargaining

Contrary to the Company's assertion, it is the analysis urged by it, not that employed by the courts below, that would stand well-settled principles on their head. The Company in effect

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[2] Indeed, this case is on all fours with this Court's decision in *Warrior & Gulf, supra*. There, an employer refused to arbitrate a grievance over its decision to contract out a substantial portion of the bargaining unit's work, asserting that its actions were privileged under a contractual management rights clause providing that "matters which are strictly a function of management shall not be subject to arbitration . . . ." In reversing the lower courts' denial of an order compelling arbitration, this Court noted that "[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." *Id.*, at 584. Finding no express exclusion or forceful evidence of intent to exclude, the Court held that arbitration should have been compelled. *Id.*

argues that, whenever a grievance can be characterized as one involving a non-mandatory subject of bargaining, the presumption favoring arbitration is converted into a presumption against arbitrability, requiring a "clear and unmistakable waiver" before arbitration may be compelled. The Company's novel contention is utterly at odds with the long line of authority discussed above.

The Company cites this Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), in support of its eccentric theory. In *First National*, this Court held that an economically-motivated partial closure decision is not ordinarily a mandatory subject of bargaining under the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.* But, as recognized by the courts below as well as those of other circuits, *First National Maintenance* simply has no relevance where, as here, the Union neither filed unfair labor practice charges with the NLRB nor sought to bargain with the Company over its decision to eliminate bargaining unit work. The Union does not assert that the Company's actions violate the NLRA but rather that the Company has violated provisions of the existing collective bargaining agreement. As stated above, this contention must be resolved under the grievance and arbitration provisions of the collective bargaining agreement, not the provisions of the NLRA.

Plant closure decisions are *not* illegal subjects of bargaining; rather, they are so-called "permissive" subjects of bargaining, and management and labor are free to bargain and to incorporate provisions regarding them into enforceable collective bargaining agreements. *First National Maintenance, supra*, 452 U.S. at 675, n. 13. Thus, in any given case management may be under no obligation under the NLRA to bargain about a certain decision, but yet may have a contractual obligation not to take that same action based upon either the express or implied provisions of the collective bargaining agreement. That is precisely the situation here. Nothing in the law suggests that an employer is free to ignore a contractual obligation it has assumed with respect to a non-mandatory subject of bargaining. The distinction the Company's position overlooks is well-illustrated in *Teamsters Local 115 v.*

DeSoto, Inc., 725 F.2d 931 (3rd Cir. 1984). There, a union challenged an employer's decision to close one of its plants both by filing unfair labor practice charges with the Board *and* by filing a grievance under the parties' collective bargaining agreement. The Board ruled that the employer's action did *not* violate the NLRA because its decision to close was not a mandatory subject of bargaining, presumably relying on *First National Maintenance*. The arbitrator, by contrast, found that the employer's conduct *did* violate the parties' collective bargaining agreement. In enforcing the arbitrator's decision in relevant part, the Third Circuit rejected the employer's argument that, "if the decision was not bargainable, it was also not arbitrable" (725 F.2d at 936), noting that:

> . . . the obligation to bargain under the NLRA does not delimit the scope of permitted bargaining. . . . The critical difference is that no rights arise under the [NLRA] if a party refuses to bargain over a nonmandatory subject. But it does not follow that there is a right under the statute to refuse to comply with a contract dealing with nonmandatory subjects. . . . "

Similarly, in *Local 206 v. Continental Can Co.*, 821 F.2d 1348 (9th Cir. 1987), the Ninth Circuit affirmed the grant of summary judgment compelling arbitration of a union's grievance over an employer's termination of its transportation operation (a partial closure) and substitution of an independent labor broker to provide drivers. The court of appeals held that arbitration of the union's grievance was mandatory notwithstanding that the parties had acknowledged in their collective bargaining agreement that the employer intended to discontinue the transportation operation, and also notwithstanding that the Board had refused to issue a complaint on the union's unfair labor practice charge challenging the same conduct as a violation of the NLRA. As the Ninth Circuit emphasized, 821 F.2d at 1352:

> The dispute over the company's employment of nonunion truck drivers comes under the arbitration clause, and is a proper subject for arbitration. The decision of the NLRB

not to issue a complaint in the matter does not preclude arbitration.

Our determination that this dispute is arbitrable is based on the language of the arbitration clause. . . . "

See also, Steelworkers v. Asarco, 970 F.2d 1448, 1452 (5th Cir. 1992):

The question whether the company's unilateral implementation of a testing policy violated the NLRA is entirely separate from the question whether the disputes that have arisen out of the testing policy are arbitrable. The fact that unilateral implementation of the testing policy did not violate the NLRA says nothing about whether the arbitration clauses in the various collective bargaining agreements cover the grievances filed by each of the locals. . . .

In sum, the courts below properly analyzed the Union's arbitration demand under this Court's long line of cases favoring arbitration of labor disputes, and properly concluded that *First National Maintenance* and other cases concerning the duty to bargain under the NLRA have no relevance to this question.

C. The Decision Below Does Not Conflict With Other Circuits

Petitioner cites two cases — (1) *Auto Workers v. Lester Engineering Co.*, 718 F.2d 818 (6th Cir. 1983) (hereinafter *"Lester"*) and (2) *Congreso de Uniones Industriales v. V.C.S. Natl. Packing*, 756 F.Supp. 69 (D. Puerto Rico 1991), *aff'd. on other grounds*, 953 F.2d 1 (1st Cir. 1991) (hereinafter *"V.C.S."*) — in an effort to fabricate a split in the circuits where none exists.

Lester involved a union's effort to obtain a preliminary injunction against the announced closure of a plant pending the outcome of an arbitration. In assessing the availability of injunctive relief,

the Sixth Circuit considered whether the parties had agreed in their collective bargaining agreement to submit the dispute to arbitration. Contrary to Petitioner's suggestion, the Sixth Circuit in *Lester* did not hold that a plant closure decision is never arbitrable. Rather, the *Lester* court merely examined the contract for "forceful evidence" of an intent to exclude the dispute from arbitration and found that a contractual provision expressly giving the Employer the exclusive right "to decide the number and location of its plants" constituted such "forceful evidence," thus precluding an order compelling arbitration. 718 F.2d at 824.[3] In short, the Sixth Circuit applied the same settled analysis applied by the Ninth Circuit in the decision below, but reached a different conclusion based upon the facts of that case.[4]

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[3] Contrary to the suggestion of Petitioner, the question whether a closure decision is a mandatory subject of bargaining played absolutely no role in the Court's analysis of the question presented. Although the court mentioned in *dicta* at footnote 3 that the closure decision was "also not subject to the duty to bargain," the purpose of its comment is impenetrable, as it hastens to add that "[w]e, of course, do not hold that the manner in which the plant was closed cannot be subject to the duty to bargain." *Id.*, 718 F.2d at 824, n. 3.

[4] Unlike the present case, the contract in *Lester* contained no provisions inconsistent with the employer's "unilateral right to close its facilities." 718 F.2d at 824. The union had grieved the closure under contract language dealing with plant moves and subcontracting. The Sixth Circuit concluded that the contractual grant of the right of closure was forceful evidence of a mutual intent to exclude closure disputes from grievance and arbitration, but did not address the application of the arbitration clause to the issues raised by the grievance. This would appear to be a questionable conclusion in the light of this Court's discussion of the arbitrability issue in *A.T.& T.*, *supra*, and *Warrior & Gulf*, *supra*. Nevertheless, differing assessments of what constitutes "forceful evidence" of non-arbitrability in differing factual situations and under differ-

(continued...)

V.C.S. presents even less of an argument for a circuit split than *Lester*. In *V.C.S.*, a union sought a district court injunction against a plant closure *without seeking arbitration*, either prior to or during the litigation. *Id.*, 953 F.2d at 2. In upholding the denial of injunctive relief, the First Circuit correctly noted that the Norris-LaGuardia Act, 29 U.S.C. Section 104, prohibits federal courts from issuing injunctions in cases involving labor disputes, *except where such injunctions are issued in aid of arbitration. Id.* Thus, because in *V.C.S.* the Union "failed to request arbitration in its discussions with the Company, in its complaint or in its brief on appeal," the First Circuit properly concluded that the Norris-LaGuardia Act barred the injunctive relief sought. *Id.*, 953 F.2d at 2-3.[5] Significantly, in denying the injunctive relief sought in *V.C.S.*, the First Circuit took care to distinguish and endorse the earlier decision in *Int'l. Ladies Garment Workers' Union v. Bali Co.*, 649 F.Supp. 1083 (D.P.R. 1986), *appeal dismissed*, 815 F.2d 691 (1st Cir. 1987), in which a plant closure was enjoined to preserve the arbitrator's power to award an adequate remedy, "not as an alternative to arbitration." *V.C.S.*, 953 F.2d at 3. Thus, contrary to the position of Petitioner herein, the law of the First Circuit appears to be completely in accord with that of the Ninth —

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[4](...continued)
ing contract provisions do not present a conflict among courts of the kind that calls for the issuance of the writ in order to bring about uniformity among the circuits.

[5] The First Circuit's decision was thus based on the failure of the union at any time to seek arbitration, and so it never reached the arbitrability question upon which the district court had premised its decision. The *V.C.S.* district court, like the Sixth Circuit in *Lester*, had found that express provisions of the collective bargaining agreement excluded the dispute from arbitration. 756 F.Supp. at 72-74. Thus, while the district court also made comments in *dicta* about the duty to bargain over the effects of plant closure (756 F.Supp. at 73, n. 3), nowhere does it suggest that in the absence of a statutory duty to bargain, the decision to close is not subject to arbitration.

to wit, in the absence of "forceful evidence" of an intent to exclude the dispute from arbitration, plant closure decisions may be arbitrated and, indeed, closure may be enjoined if necessary to preserve the arbitrator's ability to fashion a meaningful remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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